91-148

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EMILY L. LATIMER, et al,
Petitioners

v.

KENNETH L. STAINER, Trustee
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE TENTH CIRCUIT

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NO._____

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OCTOBER TERM, 1991

EMILY L. LATIMER
Petitioner and Appellant

v.

KENNETH L. STAINER, Trustee
Respondent and Appellee

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the 10th Circuit Court of Appeals correct in ruling that the Appellants had waived their right to a Jury Trial in Bankruptcy Court and/or District Court?

2. In 1985 and 1986 was the Jurisdiction and powers of the Bankruptcy Court clear enough to imply a waiver of fundamental right to a Jury Trial in Bankruptcy Court?

3. Were the Appellants and their attorney mislead by the Bankruptcy Judge in telling the Appellants that they were not entitled to a Jury Trial in Bankruptcy Court therefore no written request for Jury trial was made?

4. Did the Appellants waive their right to a Jury trial because they did not file a combined request for Jury Trial with a request for Transfer to the District Court if the Bankruptcy Court can conduct Jury Trials?

5. If the Appellants made no claims against the Bankruptcy Estate can the Appellants be deprived of their properties and

their 7th Amendment Rights by unclear procedure and where Jurisdiction lies?

6. Can the Appellants be deemed to have waived a right that they were told they did not have?

LIST OF PARTIES

The parties to the proceedings below were Emily L. Latimer and the unknown heirs, executors, administratrix, devisees and assigns of Maria L. latimer, deceased; Julia Latimer Warren, Reta Latimer Wright, James Harold Latimer and Charles Sylvester Latimer, Petitioners and Appellants.

Kenneth L. Stainer, Trustee, Respondent and Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EMILY L. LATIMER, Petitioner

v.

KENNETH L. STAINER, Trustee

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioner Emily L. Latimer, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding on November 7, 1990,

OPINIONS BELOW

The Opinion fo the Court of Appeals for the 10th Circuit is reported at 918F2d136 and is placed in the appendix as number 2.

The memorandum decision of the United States District Court for the Northern District of Oklahoma has not been reported. It is placed in the appendix hereto as number 4.

JURISDICTION

This appeal involves a review of a decision of the United States Court of Appeals, 10th Circuit declaring and imposing a waiver on the Appellants of their fundamental right to a Jury Trial in Bankruptcy Proceedings and declaring that the Bankruptcy Court has no jurisdiction to try Jury cases.

CONFLICTS

Jurisdiction also lies with the U.S. Supreme Court to resolve a conflict between the Eighth Circuit, the Tenth Circuit and the Second Circuit Court of Appeals as to what powers exist in the Bankruptcy Court.

The United States Supreme Court has jurisdiction to review this appeal and the questions presented under 28 USC 1254(1).

On May 17, 1991, in Case No. A-866, Justice Byron R. White, ordered that the time for filing this Petition for Writ of Certiorari be extended to and including June 27, 1991.

The jurisdiction of this Court to review the Judgment of the 10th Circuit is invoked under 28 USC 1254(1).

The jurisdiction to resolve a conflict between the circuits is in compliance with U.S. Supreme Court Rule 17 (A).

STATUTES INVOLVED

28 USC 1254 (1)

28 USC 157B

28 USC 1411

The Bankruptcy Amendments and the Federal Judgeship Act of 1984

STATEMENT OF THE CASE

The Debtor, Caesar C. Latimer, filed his Petition in Bankruptcy on October 5, 1985, prior to filing his petition in Bankruptcy, the Debtor conveyed certain properties back to the rightful owners which was permitted under State law without any presumption of fraud.

A creditor objected to the transfer and representing the Trustee filed an adversary proceeding to set aside the conveyances as being fraudulent and to defraud creditors.

The Appellants in this case are the owners of the property conveyed and filed no claims against the estate. The Appellants were made defendants in the adversary proceeding by the Trustee.

The first response filed by the Appellants was a Plea in Abatement and a Motion to Dismiss. In the rough draft of his pleading the attorney for the Appellants had made a written request for a Jury Trial. (A copy of same is included in the Appendix).

Prior to filing this pleading as drafted, the Appellants, through their attorney, conferred with the Bankruptcy Court about requesting a jury trial on the issues of fraudulent conveyances. The Bankruptcy Court informed the attorney and the Appellants that they were not entitled to a Jury Trial in Bankruptcy Court and the attorney and the Appellants deleted the written demand for a Jury Trial from the original pleading because of what the Bankruptcy Court had stated.

Nevertheless, the Appellants made several oral requests for a Jury Trial in Bankruptcy Court which is admitted by all parties.

The Non-Jury proceeding was held in the Bankruptcy Court and the issues of fraudulent conveyances were held against the Appellants. The Appellants filed a Motion for a New Trial and listed the denial of a Jury Trial as one of the errors committed.

The Appellants appealled the decision of the Bankruptcy Court to the Federal District Court.

The Federal District Court upheld the Bankruptcy Court and the case was appealed to the 10th Circuit.

The 10th Circuit upheld the District Court and the Bankruptcy Court and the appellants are seeking to appeal the decision of the 10th Circuit.

Pending this non-jury trial in Bankruptcy Court the U.S. Supreme Court rendered its opinion in Northern Pipeline vs. Mountain Pipeline 102 Supreme Court 2858 and in 1989 the case of Granfinanciera, sa v.s. Nordberg which gave the appellants their Seventh Admendment Rights to a Jury Trial because the appellants had submitted no claims against the bankrupt estate.

The decision in the Granfinanciera case was entirely different from what the Bankruptcy Judge told the appellants when the appellants inquired about a Jury Trial and requested a Jury Trial.

Now the 10th Circuit Court of Appeals says that the appellants had a right to a Jury Trial but the right was waived.

At no time were the appellants told that they had a right to a Jury Trial by filing a combined Transfer and a Demand f or Jury Trial.

The appellants never intended to waive their right to a Jury Trial but were told they had no right to a Jury Trial.

After the Granfinanciera decision, the appelants thought they would be granted a Jury Trial in Bankruptcy Court but the 10th Circuit held that the Jury Trial was waived because they did not follow the combined Demand & Transfer procedure rule.

If this case and the facts had occurred in the 2nd Circuit the final outcome may have been the same but the procedure to be followed would have been different. Also, the outcome may have been different.

REASONS FOR GRANTING THE WRIT

The appellants would urge two reasons why the Writ of Certiorari should be granted.

I

WAIVER OF JURY TRIAL

Under the facts and the Law as it has evolved the writ should be granted to determine whether or not the appellants and their attorney knowingly and intelligently waived their right to a Jury Trial.

The advisary proceeding against these appellants was commenced 2 years before the Supreme Court decided Granfinanciera, s.a. v.s. Nordberg 109 S. Ct. 2782 (1989) and 3 years before Langenkamp v.s. Culp 111 S. Ct. 330 (1990).

These two cases made it clear that the

appellants met the criteria for obtaining a Jury Trial and were entitled to a Jury Trial on the issue of Fradulent Conveyances.

There are numerous cases pending in the Bankruptcy Courts involving the issue of Fradulent Conveyances and Preferences and the Court should grant the Writ of Certiorari to rule on the implied waiver of a fundamental right to a Jury Trial imposed against the appellants. This is especially true in light of the uncertainty that existed prior to the decision of the Supreme Court in the Granfinanciera case.

Since the appellants rights and the law was unclear as to the rights to a Jury Trial in this area, the appellants urge the Court to set some kind of a standard or guideline for the lower courts to follow in protecting the fundamental right to a Jury Trial as provided by the 7th Amendment.

Massachusettes Trustees v.s. U.S. 377 U.S. 235

On August 10, 1990, the 10th Circuit Court of Appeals decided in the In Re Kaiser case, 911F2d380 that the appellants had made a timely demand for Jury Trial and the 10th Circuit followed the Supreme Court's decision in Granfinanciera s.a. v.s. Nordberg.

In the Kaiser case no express motion was ever made for a Jury Trial.

Three months later on November 17, 1990 the 10th Circuit Court of Appeals refused to apply the Granfinanciera decision to the appellants case but imposed a Waiver of Jury Trial against the appellants but did admit an express oral motion for a Jury Trial had been made by the appellants. The granting of a Jury Trial by the Bankruptcy Court in the District Court would not have caused any unusal delay or any extraordinary expense on either side.

After imposing the Waiver of Jury Trial right the Court set up a requirement requesting a transfer and written demand for a Jury Trial

in order to preserve the right to a Jury Trial. This was not made known to the appellants and their attorney in 1985 or 1986.

The appellants may have waived their right to a Jury Trial but it was not their intention to do so nor was it knowingly done.

The appellants are not the only persons confused in this area but this confusion has been addressed in several Law Review Articles.

72 Minn L. Rev 967

20 St. Mary's L. J. 799

II

CONFLICT BETWEEN THE CIRCUITS

The appellant would show the Court that there exist a split and conflict between the Federal Circuits as to the powers of the Bankruptcy Court.

Two circuits have split on the power of a Bankruptcy Judge to conduct a Jury Trial. In the Eighth Circuit, the Circuit Court of Appeals has held that no power exist for the Bankruptcy Court to conduct a Jury Trial.

In Re United Missouri Bank 901 F2d 1449

In Re Lee Way Holding Co. 115 BR 586

The Court of Appeals for the 2nd Circuit holds that the Bankruptcy Court does have power to conduct a Jury Trial.

In Re Ben Cooper Inc. 896 F2d 1394

If the circuits are split on the Jury Trial issue and the appellants have been told that they are not entitled to a Jury Trial who would know what their rights are?

If you do not know what your rights are then how can you waive those rights?

The opinion of the 10th Circuit in this case held that the appellant made a request for a Jury Trial in a forum where none existed and because no written demand for jury was made

along with a request for transfer the appellants loss their fundamental right to a Jury Trial.

The appellants submits to the Court that if this cause of action was brought and decided in the 2nd Circuit the final result may have been different and the appellants may have received greater protection of their fundamental rights and a different response to their request for a Jury Trial.

In order to resolve the confusion the appellants would urge the Court to grant certiorari and set guidelines for the lower courts to follow because the appellants and others are now confused over the administration of the Bankruptcy Act.

New York v.s. Saper 336 U.S. 328

Under the view and the decision of the 10th Circuit in this case a written demand for a Jury Trial would not be addressed to the Bankruptcy Court and forum where the litigants are present but to the District Court where the litigants are not present.

CONCLUSION

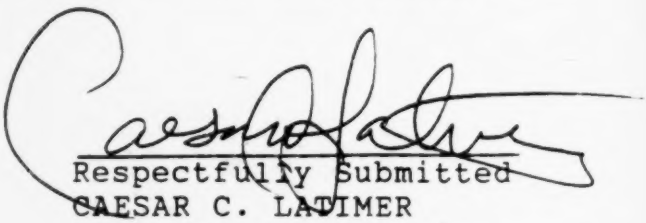
For these various reasons, this petition for certiorari should be granted. Petitioner emphasizes the fact that the appellants did not knowingly and intentionally waive their right to a Jury Trial but were told that they had no right to a Jury Trial.

The conflict between the circuits as to the powers of the Bankruptcy Court in the various circuits should be resolved.

The citizens in one circuit should not have greater fundamental rights than the citizens in another circuit.

The power of the Bankruptcy Judge to conduct Jury Trials should be the same in all circuits. The Seventh Amendment fundamental right to a Jury Trial should be strongly protected in all circuits and the imposition of waivers applied reluctantly.

The conflict between the circuits described herein will be resolved by the United States Supreme Court. If the appellants are denied certiorari in this case, the appellants will lose their property, their right to a Jury Trial and the confusion will continue.



Respectfully Submitted
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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-148

(2)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

EMILY L. LATIMER, et al PETITIONERS

vs

KENNETH L. STAINER, TRUSTEE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX

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APPENDIX

1. Supreme Court Order Granting Extension of Time.

2. Opinion of the Court of Appeals 10th Circuit.

3. Order Denying Rehearing.

4. Memorandum Opinion of the U.S. District Court for the Northern District of Oklahoma.

5. Motion for New Trial.

6. Plea in Statement.

7. Rough Draft Plea in Statement.

SUPREME COURT OF THE UNITED STATES

No.

A-866

Caesar C. Latimer,

Petitioner

v.

Kenneth C. Stainer

O R D E R

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 27, 1991.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the United
States

Dated this 17th

day of May, 1991.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re: CAESAR C. LATIMER, Debtor.	)	
KENNETH L. STAINER, Appellee,	)	
v.	)	No. 89-5116
EMILY L. LATIMER; the unknown heirs, executors, administrators, divisees, an and assigns of MARIA L. LATIMER, Deceased; JULIA LATIMER WARREN, administratrix of the estate of MARIA L. LATIMER, Deceased; JULIA LATIMER WARREN, individually; RETA LATIMER WRIGHT, JAMES HAROLD LATIMER; CHARLES SYLVESTER LATIMER, Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 88-C-594-B)

Submitted on the Briefs:

Caesar C. Latimer, Tulsa, Oklahoma, for Appellants.

David A. Carpenter, Tulsa, Oklahoma for Appellee.

Before McKAY, McWILLIAMS, and EBEL, Circuit Judges.

PER CURIAM.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendants appeal from an order of the district court affirming the bankruptcy court's order avoiding all conveyances of real property by debtor Caesar C. Latimer and his wife Emily L. Latimer. We affirm.

The trustee, Kenneth L. Stainer, commenced an adversary action in the bankruptcy court to recover the real property the debtor had conveyed five months before filing his Chapter 7 bankruptcy petition to Mrs. Latimer, and which she subsequently conveyed in part to the other defendants. None of the defendants had submitted a claim against the bankruptcy estate. At a pretrial conference, the bankruptcy court denied defendants oral demand for a jury trial. After trial, the bankruptcy court avoided all of the conveyances by debtor and Mrs. Latimer. Defendants appealed to this court, after the district court affirmed the bankruptcy court.

On appeal, defendants first argue that the debtor had standing to participate in this adversary proceeding. We agree with the district court's determination that debtor had no standing, due to his failure to move to intervene in this adversary action.

Defendants argue the bankruptcy court erred in ruling they were not entitled to a jury trial, because, they contend, they did not waive their right to a jury trial. After determining bankruptcy courts are without jurisdiction to conduct jury trials, the district court concluded defendants' failure to request a transfer to the district court after the bankruptcy court denied their request for

a jury trial effectively waived their right to a jury trial.

The trustee first maintains the bankruptcy court properly denied the request for a jury trial because defendants made an oral rather than a written request for jury trial. We agree. A request must be in writing. Fed. R. Civ. P. 38 (b); Bankr. R. 9015 (abrogated Mar. 30, 1987). Thus, defendants did not make a proper request for a jury trial.

Even if defendants had made a proper request, we accept the trustee's argument that defendants waived their right to a jury trial. In Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782(1989), the Court held that when a proper demand for a jury

trial has been made, a person who had not submitted a claim against a bankruptcy estate has a seventh amendment right to a jury trial when sued by a trustee to recover alledged fraudulent conveyances of property. The Court, however, expressly declined to decide whether bankruptcy courts have authority to conduct jury trials in fraudulent conveyance actions. Id. at 2802. In considering the issue, this court has recently held that bankruptcy courts may not hold jury trials. In re Kaiser Steel Corp., 911 F.2d 380, 389-92 (10th Cir. 1990).

In Kaiser Steel, the parties filed a request for a jury trial and a request to withdraw reference to the bankruptcy court in the adversary action to recover

transferred assets. This court concluded that "(w)here the seventh amendment requires a jury trial to be held in bankruptcy, that trial must take place in the district court, sitting in its original jurisdiction in bankruptcy." Id. at 392. Accordingly, this court directed the district court to withdraw the reference and conduct a jury trial on the issues for which timely demand had been made. Id.

In the case at bar, defendants requested only a jury trial; they did not request transfer to the district court. Failure to make such a request was a waiver of the right to a jury trial.. We hold that to avoid waiver, parties seeking a jury trial must combine their request for a jury trial with a request for transfer to the district court. Accordingly, the district court was not clearly erroneous in deciding the

request for a jury trial without a request for transfer waived the right to a jury trial. See Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988).

Defendants also argue the district court erred in determining the conveyances were fraudulent and should be avoided. After reviewing the record on appeal, we conclude the bankruptcy court did not err in determining the conveyances were fraudulent.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: CAESAR C. LATIMER, Debtor. ---------- KENNETH L. STAINER, Appellee, v. EMILY L. LATIMER; the unknown heirs, executors, adnubustrators, devisees, and assigns of MARIA L. LATIMER, Deceased; JULIA LATIMER WARREN, administratrix of the estate of MARIA L. LATIMER, Deceased; JULIA LATIMER WARREN, individually; RETA LATIMER WRIGHT; JAMES HAROLD LATIMER; CHARLES SYLVESTER LATIMER, Appellants.	No. 89-5116

ORDER

Before McKAY, McWILLIAMS, and EBEL,

Circuit Judges.

This matter is before the court on appellants' petition for rehearing.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Entered for the Court

ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	Case No. 85-02693-C
	)	Chapter 7
CAESAR C. LATIMER,	)	
	)	
Debtor,	)	
	)	
KENNETH L. STAINER, Trustee,	)	Adversary No. 87-0055-C
	)	
Plaintiff/Appellee,	)	
	)	88-C-594-B
v.	)	
	)	
EMILY L. LATIMER, et al,	)	
	)	
Defendants/ Appellants.	)	

ORDER

Now before the court is the appeal of defendants and Caesar C. Latimer from the Final Judgment of the United States Bankruptcy Court for the Northern District of Oklahoma, entered in an adversary proceeding on 4/11/88. An advisory hearing was held before Magistrate John Leo Wagner on 5/24/89 and oral

arguments were heard. Having reviewed the pleadings and applicable law and being fully advised in this matter, the court finds as follows.

THE FACTS

In 1957, the debtor, Caesar C. Latimer ("Latimer"), an attorney, received legal title to a parcel of land, referred to as the "Hartford property", from his mother, Maria L. Latimer. Maria L. Latimer continued to use the property for herself and her children. In 1976 Latimer obtained permission from his mother to renovate and use the property as a law office. Latimer also had legal title to several vacant lots and a studio.

In 1984 Andrea Van Dyke ("Van Dyke"), a client of Latimer, commenced a state court action against Latimer for mismanagement of legal affairs in Tulsa County District Court in Case No. CJ-84-600. A jury trial was held on 5/15/85

and 5/16/85 and the jury rendered a verdict in favor of Van Dyke in the sum of $47,200.00. The judgment in the state court action was reversed on 2/10/87, as to the issue of damages only, by the Oklahoma Court of Appeals and was remanded to the District Court for further proceedings with respect to determination of damages.

Two weeks prior to the state court trial, Latimer conveyed the parcels of real estate to his wife. The Hartford property was conveyed in trust for the benefit of his mother and the other properties were conveyed directly to his wife. After the transfer of the Hartford property in trust for Maria L. Latimer, a loan was made on this property for her support with North Side State Bank. The proceeds from the loan were deposited in a trust account at

North Side State Bank and used for the support of Maria L. Latimer prior to her death.

Five months after the conveyances were made, on 10/4/85, Latimer filed his voluntary petition for bankruptcy under Chapter 7. Latimer listed in his Bankruptcy Schedule non-exempt properties he held jointly with his mother. Latimer's Bankruptcy Schedule also listed, as an unsecured creditor, the Judgment claim of Andrea Van Dyke for $50,000.00, which was later reversed. Van Dyke then filed an adversary proceeding in the Bankruptcy Court for the Northern District of Oklahoma, No. 85-0331, seeking a denial of Latimer's discharge in his Chapter 7 proceeding because of his alleged fraudulent conveyances. The Bankruptcy Court denied Latimer's discharge on 11/25/86, finding that fraudulent conveyances had been made.

On 11/19/85 Maria L. Latimer passed

away and the property was conveyed to her surviving heirs, Julia Latimer Warren, Reta Latimer Wright, James Harold Latimer, and Charles Sylvester Latimer by Emily L. Latimer, Trustee. Latimer did not participate because of the Bankruptcy.

On 12/2/86 Latimer commenced a proceeding, Case No. 86-C-1070-E, in the United States District Court for the Northern District of Oklahoma, appealing the denial of his discharge in adversary proceeding 85-0331. He sought an abatement of the adversary proceeding brought by Van Dyke because the Oklahoma Court of Appeals had reversed the issue of damages in the malpractice action. The district court refused to stay the adversary proceedings. On 9/25/87 U.S. District Judge James O. Ellison affirmed the Order of the Bankruptcy Court in

Case No. 86-C-1070-E stating as follows:

> In its Order denying discharge the Bankruptcy Court found that Defendant conveyed five properties to his wife on May 3, 1985 and another property to his wife and mother on May 10, 1985, that Defendant did not receive any consideration for the transfers, and that Defendant filed his bankruptcy petition on October 4, 1985. The Court also found that Defendant introduced insufficient evidence to prove that the properties were originally purchased with funds primarily provided by other family members. Based on the transfers of property to family members without consideration during the pendency of litigation, the Bankruptcy Judge found that the conveyances to the debtor's wife were made with an intent to defraud creditors.
>
> Under Bankruptcy Rule 8013 this Court must accept the findings of the Bankruptcy Judge unless they are clearly erroneous. The Court has reviewed the transcript of the hearing and reviewed the exhibits. Based on the evidence adduced at trial this Court is satisfied that the findings of fact made by the Bankruptcy Court are correct. The six properties were held in the name of the debtor, Caesar Latimer. Although Mr. Latimer testified that these properties were either given to him by his mother or that he purchased them with funds belonging to his wife, he also admitted that he had put his own

into some of the properties. Furthermore, in a writing introduced as Plaintiff's exhibit 9 Mr. Latimer stated,'I conveyed, the property back to my mother in May 1985 under a threat of federal tax liens.' Considering the fact that Mr. Latimer was a defendant in a law suit which went to trial shortly after the conveyances to his wife were executed, that he received no consideration for the transfers, and that he admitted holding legal title and having some equitable interest in the property, the bankruptcy court was justified in finding that the convyances were made for the purpose of defrauding Mr. Latimer's creditors.

Under 11 U.S.C. 727(a) (2) (A) the Court may deny a discharge to a debtor who has transferred property of the debtor's estate with an intent to hinder, delay or defraud a creditor, and such transfer has occurred within one year of the filing of the petition. On the basis of the Bankruptcy Court's finding of the fraudulent transfer of the property within one year of the date of the filing of the debtor's petition, the Bankruptcy Court correctly denied the debtor's discharge.

Latimer appealed the court's 9/25/87 order, but on 3/4/88 the appeal was dismissed for want of prosecution.

On 5/7/87 the Trustee commenced the

adversary proceeding resulting in this appeal, Case No. 87-0055-C, to recover from Emily L. Latimer, Latimer's wife, the seven parcels of property which had allegedly been fraudulently conveyed to her. During the pretrial proceedings in the adversary proceeding, the Trustee learned that Emily L. Latimer had conveyed various undivided interests in one of the subject parcels of real property to the living brothers and sisters of Latimer. The Trustee therefore made application to the Bankruptcy Court to join as additional parties-defendant the various grantees of Emily L. Latimer, who are now also appellants before this Court.

While this bankruptcy adversary proceeding was pending, Tulsa Development Authority purchased the Hartford property from Emily L. Latimer and the heirs of Maria L. Latimer, deceased for $26,500.00.

This money is now in the hands of the Trustee, but the appellants claim it belongs to them through inheritance.

At the trial of the adversary proceeding on 4/11/88, the Honorable Stephen J. Covey found from the evidence presented that Latimer had conveyed the seven parcels of real property, which are the subject of this action, to Emily L. Latimer, and she to the other defendants, fraudulently with respect to creditors of Latimer, that no consideration was received for these transfers, and that the Trustee, under the provisions of 11 U.S.C. Sec. 544-550, was able to avoid the transfers in question and recover for the estate, for the benefit of creditors, all parcels of real property conveyed by Latimer in May of 1985 and the proceeds paid from the sale of the Hartford property.

The appellants then filed their Notice

of Intent to Appeal on all issues and perfected this appeal. Appellants allege that Latimer has standing to participate in and object to the adversary proceedings, that the Bankruptcy Court did not have personal jurisdiction over appellants to determine their claim to the properties, that the court erred in denying them their right to a jury trial, and that the conclusions of the judge that the transfers were fraudulent were clearly erroneous.

The appellee claims that Latimer has no standing in this proceeding, as he was not a party to it, that the Bankruptcy Court had jurisdiction over the appellants by reason of their entry of appearance in the action, that appellants waived their right to jury trial by failing to make a timely request for such, that the conclusions of the judge were not clearly erroneous, and that the transfers of the

property were fraudulent.

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. Sec. 158(a).[1]

Bankruptcy Rule 8013 sets forth a "clearly erroneous" standing for appellate review of bankruptcy rulings with respect to findings of fact. In Re: Marrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However,

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[1]28 U.S.C. Sec. 158(a) reads as follows:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title (28 USCS Sec. 157). An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

this "clearly erroneous" standard does not apply to review of mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater, Inc., 836 F.2d 1263,1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

LATIMER HAS NO STANDING TO PARTICIPATE IN THIS PROCEEDING

The court finds that Latimer was not a party to the proceedings below which gave rise to this appeal and he did not make application to intervene. Additionally,

Latimer litigated the issues presented herein in the prior adversary proceeding in Bankruptcy Case No. 85-0331-C. Appellee has properly asserted that res judicata applies here, because the issue decided in the prior litigation was identical to the issue presented in the present case, there was a final judgment on the merits in the prior litigation, and Latimer was a party in the prior case. Blonder-Tongue v. University Foundation, 402 U.S. 313,323 (1971). Because Latimer has litigated the question of the fraudulent aspect of the conveyance of the subject parcels of real property, the court finds that he is barred by the doctrine of res judicata from this appeal of the case

relitigated that issue. In addition, the remaining defendants are in privity to Latimer, so their property rights are successive to his, and they are therefore collaterally estopped from relitigating the issues presented in the prior proceeding. "'Collateral estoppel can be invoked by a stranger to the judgment against one who has a party, or in privity with the party, to the judgment and had a full oppor--- tunity in the prior action to litigate the relevant issue.'" Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7, 13 (Okla. 1974).

THE BANKRUPTCY COURT HAD PERSONAL JURISDICTION OVER THE REMAINING APPELLANTS TO ADJUDICATE THE ISSUES NOW ON APPEAL.

The Bankruptcy Court for the Northern District of Oklahoma had subject matter jurisdiction in the below adversary

proceeding by virture of 28 U.S.C. Sec. 1334 and 11 U.S.C. Sec. 544-550.

Defendants do not assert that the Bankruptcy Court lacks subject matter jurisdiction to proceed in the adversary proceeding, but claim that they are not subject to the in personam jurisdiction of the trial court. However, the record on appeal in this cause clearly reflects that docket number 13 of the adversary proceeding, the Order Denying Motion to Dismiss Staying Further Proceedings and Enjoining Defendnats, shows the entry of appearance by all additional parties-defendant in this cause on that date by their then counsel Paul Garrison, thereby making all the defendants subject to the court's in personam jurisdiction. The court finds that the defendants voluntarily appeared in the proceeding now being appealed and have consented to the

assumption of in personam jurisdiction over them by the trial court.

DEFENDANTS WAIVED THEIR RIGHT TO A JURY TRIAL

The United States Supreme Court, in Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), held that bankruptcy courts were without jurisdiction to conduct jury trials. Congress subsequently amended 28 U.S.C. Sec.1334, which vests the United States District Courts with original, but not exclusive, jurisdiction in all civil proceedings arising under Title 11 of the U.S. Code. In re Hoffman, 33 B.R. 937 (Bkr. W.D. Oklahoma, 1983).

The court finds that defendant's first request for jury trial in this matter was presented at a pretrial conference held on 2/19/88. The minute order contained in the docket sheet for the adversary proceeding below reflects that on that

date an oral motion for jury trial was made by defendants and, properly, denied by the trial court. Defendants failed to request transfer of the adversary proceeding to the District Court in order to receive a jury trial on the issues. Their failure to request such a transfer effectively waived their right to jury trial.

THE BANKRUPTCY JUDGE DID NOT ERR IN FINDING THAT THE CONVEYANCES AT ISSUE WERE FRAUDULENT

Under 11 U.S.C. 548 (a), the trustee may avoid any transfer of an interest of the debtor in property made within one year of the filing of the bankruptcy petition, if such transfer was made with an intent to hinder, delay, or defraud a creditor. The facts of the case show that there are at least two claims against the bankruptcy estate -- Van Dyke's Judgment from her lawsuit and a claim for unpaid taxes. The evidence shows that six pro-

perties were held in the name of Latimer. Although Latimer testified that these properties were either given to him by his mother or that he purchased them with funds belonging to his wife, he also admitted that he had put his own money into some of the properties. Furthermore, Latimer stated in writing that "I conveyed the property back to my mother in May 1985 under a threat of federal tax liens." Latimer conveyed five properties to his wife on 5/3/85 and another property to his wife and mother on 5/10/85 and filed his bankruptcy petition on 10/4/85.

Considering the fact that Latimer was a defendant in a lawsuit which went to trial shortly after the conveyances to his wife were executed, that he received no consideration for the transfers, and that he admitted holding legal title and having some equitable interest in the property,

the bankruptcy court was correct in finding that the facts show conveyances made for the purpose of defrauding Latimer's creditors. Under bankruptcy law, the Trustee could avoid the property transfer and take legal title to the real property. The issue of the ownership of equitable title in and to the subject real properties was not a proper issue to be decided by the bankruptcy judge and was not decided by him.

CONCLUSION

For the foregoing reasons, the court affirms the decision of the United States Bankruptcy Court for the Northern District of Oklahoma entered on 4/11/88.

Dated this 13th day of June, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: CAESAR C. LATIMER, Debtor, vs. KENNETH L. STAINER, Trustee Plaintiff, EMILY L. LATIMER and the unknown heirs, executors, administrators, devisees, and assigns of MARIA LATIMER, deceased, Defendants, and JULIA LATIMER WARREN administratix of the estate of MARIA L. LATIMER, deceased, JULIA LATIMER WARREN, individually, RETA LATIMER WRIGHT, JAMES HAROLD LATIMER and CHARLES SYLVESTER LATIMER, Additional Parties Defendant.	Case No. 85-01693-C Chapter 7 Adversary No. 87-0055-C

MOTION FOR NEW TRIAL

COMES now the debtor, Caesar C. Latimer, and all other defendants and moves the Court to set aside the findings of facts and conclusions of the law and judgment entered herein on the 11th day of April 1988 and to grant the Debtor and all of

the Defendants a New Trial on the grounds that:

(1)

That the Court erred in ruling that the Debtor and Defendants were not entitled to a Jury Trial on the issues.

(2)

The Court erred in refusing to allow the property transferees to participate in the distribution of the estate and in ruling that they are not entitled to participate in the property transferred.

(3)

The Court erred in finding that the Debtor, Caesar C. Latimer was responsible for any damages sustained by the unsecured creditor Andrea Van Dyke.

(4)

That the Court erred in fixing damages for an unsecured creditor three years after the property had been transferred.

(5)

That the Court erred in finding that the transfer of the property by the Debtor was to hinder and defraud creditors.

(6)

That the Court erred in considering the value of the property transferred and finding that the property transferred rendered the Debtor insolvent.

That the market value of the property in May 1985 was not the same as the market value on April 11, 1988 which was used by the Court in determining the Debtor's insolvency.

(7)

That the Court erred in finding that the Defendants had no legal title in said properties and that the conveyances should be set aside and placing all of the property titles in the trustee for the Debtor's estate, Kenneth L. Stainer.

(8)

That the Court erred in finding that Macho Daniel Van Dyke had a claim against the Debtor's estate. No claim was ever asserted and the statue of limitation would apply.

(9)

That the Court erred in fixing the claim of Andrea Van Dyke at the sum of $30,379.21.

(10)

That the Court erred in refusing to consider whether negligence by the debtor was the direct or proximate cause of any damages sustained by the Creditor.

(11)

The Court erred in not allowing the Debtor to pursue the action pending in State Court.

(12)

The Court erred in depriving the Debtor of his right to a Jury Trial on the issue of damages in State Court in violation of the Debtor's Constitutional Rights.

(13)

Under the facts and circumstances of this case the Court erred in ruling that the Trustee of Debtor's estate is a Bona Fide Purchaser For Value without notice.

(14)

The Judgment is contrary to law in that it deprives the Debtor and the Defendants of their Constitutional Rights and respective property rights, denies the defendants due process of law and overly protects an unsecured creditor.

Dated April 21, 1988

Paul Garrison
Attorney for Defendants
7130 South Lewis
Tulsa, Oklahoma 74136

CERTIFICATE OF MAILING

I, Caesar C. Latimer do hereby certify that a copy of this motion was mailed to Attorney David A. Carpenter, 320 South Boston, Tulsa, Oklahoma and Kenneth L. Stainer, 221 South Nogales, Tulsa, Oklahoma.

Caesar C. Latimer

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: CAESAR C. LATIMER, Debtor,	)	
KENNETH L. STAINER, Trustee, Plaintiff,	)	Case No.85-01693
vs	)	Adversary No. 87-0055
EMILY L. LATIMER, and the unknown heirs, executors, administrators, devisees and assigns of MARIA L. LATIMER, deceased, Defendants.	)	

PLEA IN ABATEMENT & MOTION TO DISMISS

COMES now the Defendant by their Attorney Paul Garrison and pursuant to Bankruptcy Rule 7012 and Rules 12 (B) (1)-12(H) (3) F.R. Civ. P., move the court to abate and/or dismiss this action for the following reasons:

(1)

That the Complaint failed to alledge any creditors that have been defrauded by the alledged transfer of title.

(2)

That the Adversary claim as set forth in paragraphs 4,5 & 6 of the Complaint is based upon a Judgment that has been reversed by the Oklahoma Court of Appeals rendering the complaint and the attached exhibit vague and ambiquous.

(3)

That said Judgment (now reversed) was the bases for the Adversary proceeding.

(4)

That the Court lacks jurisdiction of the subject matter.

WHEREFORE the Defendants pray that this action be dismissed with costs to the Plaintiff.

Paul Garrison
Attorney for Defedants

CERTIFICATE OF MAILING

I, Caesar C. Latimer do hereby certify that a copy of this motion was mailed to Attorney David Carpenter, 2415 E. Skelly

Drive, Tulsa, OK and Kenneth L. Stainer,

221 S. Nogales, Tulsa, OK.

CAESAR C. LATIMER

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: CAESAR C. LATIMER, Debtor, KENNETH L. STAINER, Trustee, Plaintiff,	Case No. 85-01693
vs	Adversary No. 87-0055
EMILY L. LATIMER, and the unknown heirs, executors, administrators, devisees and assigns of MARIA L. LATIMER, deceased, Defendants.	

PLEA IN ABATEMENT
&
DISMISS

COMES now the Defendants by their Attorney Paul Garrison and in response to the complaint herein alleges that this court has no jurisdiction of said suppossed cause of action set forth in the complaint for the reasons that the trustee failed alledge creditors that have been defrauded by the alledged transfer of title.

1). That the adversary claim as set forth in paragraphs 4,5, & 6 of the complaint is based upon a judgment that has been reversed by Oklahoma Court of Appeals.

2). The Court lacks Jurisdiction.

WHEREFORE the Defendants pray that this action be dismissed with costs to the Plaintiff. Defendants request a Jury Trial.

Paul Garrison
Attorney for Defendants

CERTIFICATE OF MAILING

I, Caesar C. Latimer do herety certify that a copy of this motion was mailed to Attorney David Carpenter, 2415 E. Skelly Dr., Tulsa, Ok and Attorney Kenneth L. Stainer, 221 S. Nogales, Tulsa, Ok.

Caesar C. Latimer

Supreme Court, U.S.
FILED
AUG 22 1991
OFFICE OF THE CLERK

NO. 91-148

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1991 TERM

EMILY L. LATIMER, Petitioner

v.

KENNETH L. STAINER, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David A. Carpenter
Attorney at Law
4157 South Harvard, Suite 125
Tulsa, Oklahoma 74135
(918) 749-0050

ATTORNEY FOR REPSONDENT

QUESTIONS PRESENTED

I. Whether the Petitioner waived her rights to trial by jury before the United States Bankruptcy Court by not demanding same in writing.

II. Whether a conflict exists among the Circuits regarding the effect of failure to demand jury trial in the United States Bankruptcy Court timely and in writing.

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RULES OF COURT

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STATUTES OR RULES INVOLVED

Fed.R.Civ.P. 38(b) and (d).

JURY TRIAL OF RIGHT

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Fed.R.Bank.P. 9015 (abrogated March 30, 1987)

(a) *Trial by Jury.* Issues triable of right by jury shall, if timely demanded, be by jury, unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

(b) *Demand.*

(1) *Time; Form.* Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a demand therefor in writing not later than 10 days after service of the last pleading directed to such issue. The demand may be indorsed on a pleading of the party. When a jury trial is demanded it shall be designated by the clerk in the docket as a jury matter.

(2) *Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be

deemed to have demanded trial by jury of all the issues so triable. If he has demanded trial by jury of only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues.

(3) *Determination by Court.* On motion or on its own initiative the court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded or whether a demand for trial by jury in a proceeding on a contested petition shall be granted.

(c) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5005 constitutes a waiver of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(d) *Trial by the Court.* Issues not demanded for trial by jury shall be tried by the

court. Notwithstanding the failure of a party to demand a jury when such a demand might have been made of right, the court on its own initiative may order a trial by jury of any or all issues.

(e) *Advisory Jury and Trial By Consent.* In all actions not triable of right by jury the court on motion or on its own initiative may try and issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(f) *Applicability of Certain of the Federal Rules of Civil Procedure.* Rules 47-51 of F.R.Civ.P. apply when a jury trial is conducted.

STATEMENT OF THE CASE

The Debtor, Caesar C. Latimer, filed a voluntary Chapter 7 petition with the United States Bankruptcy Court for the Northern District of Oklahoma on October 5, 1985, seeking relief from his creditors.

In May of 1985, the Debtor conveyed numerous parcels of real property to his wife, the Petitioner, Emily L. Latimer, both in her individual right and, ostensibly, in trust for the benefit of the said Emily L. Latimer and the Debtor's mother, Maria L. Latimer.

The Chapter 7 Bankruptcy Trustee, Kenneth L. Stainer, respondent herein, commenced an adversary proceeding in the United States Bankruptcy Court for the Northern District of Oklahoma on May 7, 1987, denominated Case Number 87-0055-C, for recovery from the Petitioner, some seven parcels which had been conveyed to her by her

husband in May of 1985, as above described.

Shortly following the filing of the adversary Complaint, the Trustee learned that immediately prior to commencement such adversary proceeding, Emily L. Latimer had conveyed several of the parcels of the property above mentioned to various family members of the Debtor. Upon motion, the Respondent sought leave to join such family members as additional parties Defendant, which request was granted by the Bankruptcy Court. Counsel for Emily L. Latimer, in open court, entered his general appearance on behalf of all such additional parties Defendant.

No written request for jury trial was ever filed by the Petitioner or any other additional party Defendant.

Trial was conducted in such adversary proceeding on April 11, 1988, with the Bankruptcy Judge, Honorable Stephen J. Covey, finding from the evidence that the Debtor had

conveyed all the subject parcels of real property to his wife, Emily L. Latimer, petitioner, and she to the other Defendants, fraudulently with respect to the creditors of the Debtor. The Bankruptcy Court further found that no consideration was received for such transfers and that the Respondent was able to avoid such transfers and recover for the estate, for the benefit of the Creditors, all parcels of real property conveyed by the Debtor in May of 1985. The Defendants below appealed first to the United States District Court for the Northern District of Oklahoma, Honorable Thomas R. Brett presiding, and thereafter to the United States Court of Appeals for the Tenth Circuit. In both instances, the decision and judgement of the tribunal appealed from were, in all respects, affirmed. A copy of the Per Curiam opinion of the United States Court of Appeals for the Tenth Circuit, and the Order of the United States Bankruptcy Court for the

Northern District of Oklahoma (affirming the Bankruptcy Court judge) are appended to the Petition for Certiorari by the Petitioner herein.

Of the Defendants to the Bankruptcy Court adversary proceeding, only Emily L. Latimer now seeks review by way of certiorari before this Court. A Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed by the Petitioner, Emily L. Latimer, by and through her attorney, Caesar C. Latimer, who was coincidentally, the Debtor before the United States Bankruptcy Court, and from whose Chapter 7 Bankruptcy case this Petition for Certiorari directly arises.

SUMMARY OF ARGUMENT

I. The Petitioner waived her rights to jury trial by not following appropriate procedures to protect a right to jury trial.

II. There is no conflict among the Circuits as to the effect of waiver of right to jury trial by failure to timely demand the same in writing.

ARGUMENTS AND AUTHORITIES

I.

THE SINGLE ISSUE BEFORE THIS COURT ON CERTIORARI IS WHETHER THE PETITIONER WAIVED HER RIGHTS TO JURY TRIAL BY NOT FOLLOWING APPROPRIATE PROCEDURES TO PROTECT A RIGHT TO JURY TRIAL.

Notwithstanding the obfuscation engaged in by Petitioner, the sole issue before this Court is whether, assuming Petitioner had a right to trial by jury on the issues presented to the Bankruptcy Court, she nonetheless waived those rights by failure to properly demand jury trial in writing, as prescribed by the Federal Rules of Civil Procedure.

It is uncontested that the Petitioner failed to make a written request of any sort for trial by jury before the United States Bankruptcy Court for the Northern District of Oklahoma. The only such request by the Petitioner was made orally at the pre-trial conference, held by Honorable Stephen J. Covey, the trial judge in the Bankruptcy

Court.

There has never been a written demand for trial by jury filed in any of the proceedings leading up to this request for review by the Petitioner. Further, although not properly reviewable by this Court as having never been submitted to any prior tribunal (either for trial purposes or on appeal), the Plea in Abatement, mis-named Plea in Statement in the Appendix accompanying the Petition for review before this Court, fails to make request for jury trial.

The issue before the Court in this matter is not whether bankruptcy courts generally have the power to conduct jury trials, as is suggested by the Petitioner, but rather, whether the Petitioner failed to preserve what rights to jury trial she had by failing to make proper demand for jury trial in accordance with Federal Rule of Bankruptcy Procedure 9015 (abrogated March 30, 1987) and

Fed.R.Civ.P. 38(b).

This Court has long ago determined any right to jury trial is waived where no demand for such trial has been made as required by Fed.R.Civ.P. 38(b). See, United States v. Moore, 340 U.S. 616, 95 L.Ed. 582, 71 S.Ct. 524 (1951), reh den 341 U.S. 923, 95 L.Ed. 1356, 71 S.Ct. 740.

Petitioner further suggests that if a waiver of her rights for trial by jury occurred, such was occasioned by inadvertence and was not a "knowing" act of the Petitioner or her counsel.

This issue is without merit, as courts have uniformly held that the right to jury trial is waived by inaction, even though such inaction is due to ignorance of the provisions of Fed.R.Civ.P. 38. See, Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952), Gulbenkian v Gulbenkian, 147 F.2d 173, 158 A.L.R. 990 (2nd Cir. 1945).

A case is properly tried by the Court as

a "jury-waived" case where the record does not show there was any demand for jury trial in compliance with Fed.R.Civ.P. 38(b). See, Gasifier Mfg. Co. v. General Motors Corp., 138 F.2d 197, (8th Cir. 1943), Murphy v. Shelby, 353 F.2d 418 (8th Cir. 1965).

The Petitioner may not argue on appeal that the trial court improperly denied her the right to trial by jury, as to claims properly triable to a jury, where she never served a written demand for trial by jury as required by Fed.R.Civ.P. 38(b). See, Jones v. Birdsong, 679 F.2d 24 (5th Cir. 1982). If a petitioner does not make written demand for jury trial as required by Rule 38(b), such inaction constitutes waiver of trial by jury. See, Littlefield v. Ft. Dodge Messenger, 614 F.2d 581 (8th Cir. 1980), cert. den 445 U.S. 945, 63 L.Ed.2d 779, 100 S.Ct. 1342.

Thus, it is abundantly clear that this Court is not called upon to review the issue of whether a jury trial may be conducted by

a bankruptcy court, a non-Article III tribunal, but rather, whether the Petitioner, by failing to serve written demand for trial by jury as required by the applicable Federal Rule of Civil Procedure and the now abrogated Bankruptcy Rule (Rule 9015), waived whatever rights to trial by jury she may have had with respect to the adversary proceeding initiated by the bankruptcy trustee for avoidance of the fraudulent conveyances.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE EFFECT OF WAIVER OF RIGHT TO JURY TRIAL BY FAILURE TO TIMELY DEMAND THE SAME IN WRITING.

The Petitioner attempts to further bootstrap her inadequate petition for review before this Court by attempting to establish that a conflict exists among the circuits regarding the power of a bankruptcy court to conduct trial by jury.

This non-issue is a smokescreen and blind on the part of the Petitioner. Whether or not such conflict exists, it need not be decided by this Court in this matter, for the reason that the Petitioner waived whatever rights she may have had to jury trial by failure to demand the same in writing timely.

The speculation found in page fourteen of the Petition for Writ of Certiorari before this Court (that the result might have changed had this action been initiated within the geographical confines of the Second Circuit) is specious, as the Second Circuit has previously held that waiver of right to jury trial occurs when litigants fail to properly perfect such right by timely written demand therefor. See, Gulbenkian v. Gulbenkian, supra.

This Court need not decide any conflict among the circuits to adequately dispose of the matter presently before it.

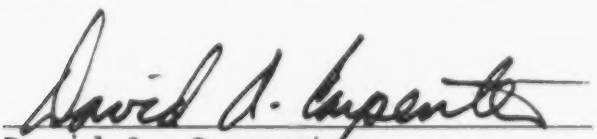
CONCLUSION

The Petition for Writ of Certiorari should be denied. The Petitioner waived her rights to trial by jury by failure to avail herself of the clear provisions set forth in Fed.R.Civ. P 38(b) and Bankruptcy Rule 9015 (abrogated).

There is no conflict among the circuits regarding the effect of waiver to demand jury trial properly.

No justifiable reason has been advanced by the petitioner as to why this Court should undertake further review of this matter.

Respectfully submitted,



David A. Carpenter
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(918) 749-0050

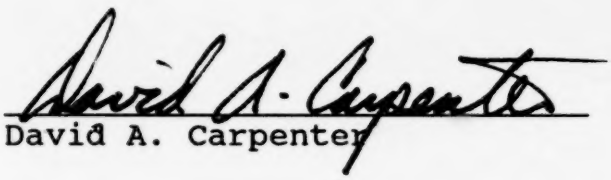
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, David A. Carpenter, do certify that on the 21st day of August 1991, I caused to be served upon the below named persons, three copies each of the foregoing Brief in Opposition to Petition for Writ of Certiorari:

James O. Goodwin
624 East Archer
P.O. Box 3267
Tulsa, OK 74101

Caesar C. Latimer
2611 North St. Lewis
Tulsa, OK 74106



David A. Carpenter